TR Lampoh ak Dana & Ors v Government of Sarawak

HIGH COURT (BINTULU) — SUIT NO 22–27 OF 2003 (BTU)
ABDUL AZIZ ABDUL RAHIM JC
15 OCTOBER 2004

Administrative Law — Remedies — Declaration — Challenging order of acquisition by state authority of native customary rights land — Acquisition of native customary rights land — Whether must proceed by way of judicial review and not declaration

Civil Procedure — Declaration — Whether correct procedures in the circumstances — Challenging order of acquisition by state authority — Acquisition of native customary rights land — Whether must proceed by way of judicial review and not declaration

Native Law and Custom — Land dispute — Customary rights over land — Aboriginal peoples' right over land — Compulsory acquisition of land by government — Whether acquisition could be challenged by way of declaration, and not judicial review — Rules of the High Court 1980 O 53

The plaintiffs claimed for a declaration of individual and communal native customary rights ('NCR') over communal native customary lands — created under Iban customs — at Rumah Lampoh and Rumah Kesiaw situate at about Km25 Bintulu-Tatau road ('the said land'). The plaintiffs claimed that their NCR over the said land had been impaired by the act of the defendant in issuing a direction cited as 'Arahan Tanah (Hak-Hak Adat Bumiputra (No51) 2001' ('the Direction') published in Sarawak Government Gazette which extinguished all the plaintiffs' native customary rights over the said land. By the Direction the said land was reverted to, and acquired by, the Government of Sarawak.

Therefore the plaintiffs claimed, *inter alia*, for a declaration that they had NCR over the said land and were still the lawful proprietors thereof and the Direction was bad in law and therefore null and void for contravening arts 5(1), 8(1) and 13(2) of the Federal Constitution.

The defendant entered a conditional appearance and applied to strike out the plaintiffs' writ and statement of claim on the ground that the plaintiffs' action was an abuse of process of the court, the reason being, the plaintiff was actually seeking public law remedies and therefore ought to proceed by way of judicial review under O 53 of the Rules of the High Court 1980 ('the RHC'), and not by way of declaration. The defendant submitted that the plaintiffs must apply to quash the Direction within 40 days after the grounds for the application arose or the Direction or Notification was communicated to the plaintiffs. Inthis case it was submitted that the Direction was made in May 2001 and gazetted in January 2002. The plaintiffs suit was filed on 14 July 2003 — well after the 40 days period allowable under O 53 r 3(6). It was argued that when the plaintiffs discovered that they were out of time for judicial review, the

plaintiffs decided to proceed by way of ordinary writ action, and this therefore was an abuse of court process. A

Held, striking off plaintiffs' claim with costs:

(1) The declaration sought by the plaintiffs on the NCR would be meaningless if the plaintiffs also did not set aside the Direction. Thus the challenge to the Direction becomes a core issue to the plaintiff case and not by a side wind. Since the issuing of the Direction is an act of a public body or authority in the form of the Minister for Planning and Resources Management the plaintiffs must proceed under O 53 of RHC 1980. Inorder to have the Direction quashed the plaintiffs must apply for an order of certiorari, the Direction being an administrative act of a public authority. It was wrong for the plaintiffs to seek a relief in a declaratory order for their NCR and then pray for a consequential order that the Minister's Direction be quashed. To allow that means to allow the plaintiffs to circumvent O 53 of RHC 1980 and all the protections afforded by it to the defendants (see para 36). B C D

(2) The creation of O 53 in the RHC 1980 is to provide certain protections to the public body or authority when their public act or decision is being challenged, eg the time limit within which the challenge to the public act or decision must be made. The public decision maker must be able to know in the shortest possible time whether its decision is going to be challenged or not. Therefore if the plaintiffs choose to challenge the act or decision of the public body or public authority under a public law by resorting to other forms of action than an action for judicial review under O 53, it would be an abuse of process (see para 40). E F

(3) In this instant case, the plaintiffs were deliberately attempting to circumvent the stringent mandatory requirements of O 53 by filing this suit to challenge the Ministerial Direction. It would seem so because it was obvious that the plaintiffs were clearly out of time as regard the 40 days time frame provided by the rules to file for judicial review at the time the suit was filed. Furthermore the plaintiffs had not obtained any leave, and neither have the plaintiffs applied and granted any extension of time to file for judicial review after the 40 days time limit (see para 41). G

(4) Insistence on strict compliance with O 53 in appropriate cases does not create rigidity and procedural exclusivity leading to dual system of law as submitted by the learned counsel for the plaintiffs. Order 53 is an adjectival law. It provides for procedures where a challenge is made against a public act or a public decision by a public body or authority. In this sense O 53 is no less exclusive when compare to the procedures for writ or originating summons. Moreover under the present O 53 the plaintiffs may obtain prayers which at one time could only be obtained through ordinary writs proceedings (see para 43). H I

(5) It was obvious from the pleadings of the plaintiffs' case that the plaintiffs grounded their claim on the allegations that the Minister had acted unconstitutionally and had breached the rules of natural justice in issuing the Ministerial Direction that formed the plaintiffs' basis of complaint. This was clearly a direct challenge to the Minister's authority to issue such direction under the relevant law. That challenge means a challenge to the validity of the Ministerial Direction itself. It was not therefore merely a collateral issue as submitted by learned counsel for the plaintiffs (see para 44).

[Bahasa Malaysia summary

Plaintif-plaintif telah menuntut satu deklarasi hak-hak adat ('NRC') secara individu dan komunal ke atas tanah adat komunal — diwujudkan di bawah adat orang Iban — di Rumah Lampoh dan Rumah Kesiaw yang terletak kira-kira KM25 Jalan Bintulu-Tatau ('tanah tersebut'). Plaintif-plaintif menyatakan bahawa NCR mereka ke atas tanah tersebut telah dirosakkan/ diganggu oleh tindakan defendan dengan mengeluarkan satu arahan yang disebut sebagai 'Arahan Tanah (Hak-Hak Adat Bumiputra (No 51) 2001' ('Arahan tersebut') yang diterbitkan dalam Warta Kerajaan Sarawak yang menghapuskan semua hak-hak adat pihak plaintif ke atas tanah tersebut. Melalui Arahan tersebut, tanah tersebut dipulangkan dan diambil oleh kerajaan negeri Sarawak.

Oleh itu plaintif-plaintif menuntut, inter alia, satu deklarasi bahawa mereka memiliki NCR ke atas tanah tersebut dan masih merupakan pemilik sah tanah dan bahawa Arahan tersebut adalah salah di sisi undang-undang dan maka seterusnya terbatal dan tidak sah kerana melanggar art 5(1), 8(1) dan 13(2) Perlembagaan Persekutuan.

Defendan telah memasukkan kehadiran bersyarat dan telah memohon untuk membatalkan writ dan penyata tuntutan plaintif atas alasan bahawa tindakan plaintif-plaintif adalah merupakan satu penyalahgunaan proses mahkamah kerana plaintif sebenarnya sedang memohon remedi undang-undang awam dan oleh itu sepatutnya meneruskan dengan cara kajian semula kehakiman dibawah A 53 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), dan bukannya dengan cara deklarasi. Defendan menghujahkan bahawa plaintif-plaintif perlu memohon untuk membatalkan Arahan tersebut dalam masa 40 hari selepas alasan bagi permohonan itu timbul atau apabila Arahan atau Notifikasi tersebut disampaikan kepada plaintif-plaintif. Dalam kes ini, dihujahkan bahawa Arahan tersebut telah dibuat pada Mei 2001 dan diwartakan pada Januari 2002. Tindakan plaintif telah difailkan pada 14 Julai 2003 — selepas tamat jangkamasa 40 hari yang dibenarkan di bawah A 53 k 3(6). Ianya dihujahkan bahawa apabila plaintif menyedari bahawa mereka telah pun melebihi masa untuk kajian semula kehakiman, plaintif-plaintif telah membuat keputusan untuk meneruskan tindakan dengan cara writ biasa, dan ini merupakan satu penyalahgunaan proses mahkamah.

Diputuskan, membatalkan tuntutan plaintif dengan kos:

(1) Deklarasi yang dipohon oleh plaintiff berkenaan dengan NCR tidak memberi apa-apa makna sekiranya plaintif tidak mengetepikan Arahan tersebut. Oleh itu, cabaran terhadap Arahan tersebut menjadi satu isu utama bagi kes plaintif dan bukannya secara sepintas lalu. Memandangkan langkah mengeluarkan Arahan tersebut adalah satu tindakan oleh badan atau pihak berkuasa awam iaitu Menteri Perancangan dan Pengurusan Sumber plaintif perlu meneruskan tindakan di bawah A 53 KMT 1980. Bagi membatalkan Arahan tersebut, plaintif perlu memohon bagi satu perintah certiorari, kerana Arahan tersebut adalah tindakan pentadbiran oleh pihak berkuasa. Adalah salah bagi plaintif untuk memohon relif melalui perintah deklarasi bagi NCR mereka dan kemudiannya memohon perintah berbangkit bagi Arahan Menteri dibatalkan. Membenarkan perkara tersebut bermaksud membenarkan plaintif memintasi A 53 KMT 1980 dan juga perlindungan yang diberikannya kepada defendan-defendan (lihat perenggan 36).

(2) Peruntukan A 53 dalam KMT 1980 adalah untuk memberi perlindungan kepada badan awam atau pihak berkuasa apabila tindakan atau keputusan awam mereka dicabar/dipertikai, eg tempoh masa di mana sesuatu cabaran boleh dibawa terhadap tindakan atau keputusan awam itu perlu dibuat. Pembuat keputusan awam perlu mengetahui dalam tempoh masa sependek mungkin sama ada keputusannya akan dicabar atau tidak. Oleh itu, sekiranya plaintif memilih untuk mencabar tindakan atau keputusan badan awam atau pihak berkuasa di bawah undang-undang awam dengan dengan cara selain daripada tindakan bagi kajian semula kehakiman, ia adalah merupakan satu penyalahgunaan proses (lihat perenggan 40).

(3) Dalam kes ini, plaintif-plaintif dengan sengaja cuba untuk memintas keperluan mandatori yang ketat di bawah A 53 dengan memfailkan tindakan untuk mencabar Arahan Kementerian. Ianya kelihatan begitu kerana adalah jelas bahawa plaintif telahpun melepasi had masa 40 hari seperti yang telah diperuntukkan undang-undang bagi memfailkan untuk kajian semula kehakiman pada masa tindakan itu difailkan. Tambahan pula, plaintif tidak mendapat sebarang kebenaran, dan tiada di antara plaintif yang telah memohon dan mendapat sebarang lanjutan masa bagi memfailkan tindakan kajian semula kehakiman selepas had masa 40 hari (lihat perenggan 41).

(4) Desakan bagi pematuhan yang ketat terhadap A 53 dalam kes-kes yang bersesuaian tidak mewujudkan kekerasan dan keeksklusifan prosedur yang membawa kepada undang-undang dua sistem seperti yang telah dihujahkan oleh peguamcara yang arif bagi plaintif. Aturan 53 adalah merupakan satu undang-undang tatacara. Ia memperuntukkan prosedur-prosedur apabila sesuatu cabaran dibuat terhadap tindakan awam atau keputusan awam yang dibuat oleh badan awam atau pihak berkuasa.

Dalam hal ini, A 53 adalah tidak kurang eksklusif apabila dibandingkan dengan prosedur untuk writ dan saman pemula. Tambahan pula, di bawah A 53 sekarang, plaintif boleh mendapatkan remedi yang mana sebelumnya hanya boleh diperolehi melalui prosiding writ biasa (lihat perenggan 43).

(5) Adalah jelas daripada pliding bagi kes plaintif bahawa plaintif mengasaskan tuntutan mereka atas dakwaan bahawa Menteri telah bertindak bertentangan dengan Perlembagaan dan telah melanggar undang-undang keadilan asasi dengan mengeluarkan Arahan Kementerian yang telah membentuk asas kepada aduan plaintif. Ini adalah dengan jelas merupakan cabaran secara langsung terhadap kesahan Arahan Kementerian itu sendiri. Maka ia bukanlah sekadar isu sampingan seperti mana yang telah dibentangkan oleh peguamcara arif pihak plaintif (lihat perenggan 44).

Notes

For cases on customary rights over land, see 10 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 632-639.

Fo cases on whether correct procedure in the circumstances, se 2(1) *Mallal's Digest* (4th Ed, 2004 Reissue) para 2105.

Cases referred to

An Board Bainne Co-operative Ltd (Irish Dairy Board) v Milk Marketing Board [1984] 2 CMLR 584 (refd)

Asia Pacific Parcel Tankers Pte Ltd v The Owners of the Ship or Vessel 'Normar Spendour' [1999] 6 MLJ 652 (refd)

Associated Provincial Picture Houses v Wednesbury Corp [1947] 2 All ER 680 (refd)

Attorney-General of Hong Kong v Zauyah Wan Chik & Ors and another appeal [1995] 2 MLJ 620 (refd)

Council of Civil Service Union & Ors v Minister for Civil Service [1984] 3 All ER 935 (refd)

Davey v Spelthorne BC [1984] AC 262 (refd)

Ladang Tai Tak (KT) Sdn Bhd v Suppiah Andy Thavar & Ors [1999] 5 MLJ 257 (refd)

Majlis Perbandaran Pulau Pinang v Syarikat Berkerjasama-sama Serbaguna Sungei Gelugor dengan Tanggungan [1999] 3 MLJ 1 (refd)

Malaysia Building Society Bhd v Tan Sri General Ungku Nazaruddin bin Ungku Mohamed [1998] 2 MLJ 425 (refd)

O'Reilly v Mackman [1983] 2 AC 237 (refd)

O'Rourke v Camden London Borough Council [1977] 3 WLR 86 (refd)

R v Jenner [1983] 2 All ER 46 (refd)

Roy v Kensington and Chelsea and Westminster Family Practitioner Committee [1992] 1 All ER 705 (refd)

Shaharuddin bin Ali & Anor v Superintendent of Lands and Surveys Kuching Division & Anor [2005] 2 MLJ 555 (refd)

Sivarasa Rasiah v Badan Peguam Malaysia & Anor [2002] 2 MLJ 413 (refd)

Subramaniam a/l Vythilingam v The Human Rights Commission of Malaysia (SUHAKAM) & Ors [2003] MLJU 94 (refd)

Trustees of the Dennis Rye Pension Fund & Anor v Sheffield City Council [1997] 4 All ER 747 (refd)
Wandworths London BC v Winder [1984] 3 All ER 976 (refd)
Yahya Bin Kassim v Government of Malaysia [1997] 3 MLJ 749 (refd)

Legislation referred to

Arbitration Act 1952 ss 6, 32
Courts of Judicature Act 1964 s 25
Federal Constitution arts 5(1), 8(1), 13(2), 153, Pt II
Land Settlement Ordinance 1933 s 66
Rules of High Court 1980 O 15 r 16, O 18 r 19, (1)(d), O 53, r 2(2), (3), r 3(6), O 92 r 4
Sarawak State Constitution art 39
Sarawak Land Code ss 5(1), (2), (3), (4), 212
Specific Relief Act 1950 ss 41, 44–49, Chap VI of Pt 2, Chap VIII of Pt 2
Town and Country Planning Act 1971 [UK]

Paul Raja (See Chee Hua with him) (Paul Raja & Co) for the plaintiffs.
Jonathan Jolly (Keiza with him) (State Attorney-General's Chambers) for the defendant.

Abdul Aziz Abdul Rahim JC:

THE PLAINTIFF'S CLAIM

[1] By a writ dated 15 July 2003 and a statement of claim dated 12 July 2003 (encl 2) the plaintiffs claimed for a declaration of individual and communal native customary rights over communal native customary lands — created under Iban customs — at Rumah Lampoh and Rumah Kesiaw situate at about Km25 Bintulu-Tatau road and which are particularised and described at para 4 of the plaintiffs' statement of claim ('the said land').

[2] The plaintiffs claimed that their native customary rights over the said land had been impaired and abridged by the act of the defendant through its servant and agent the Permanent Secretary to the Ministry of Planning and Resources Management in making or issuing or in causing to be made or to be issued under s 5(3)(4) of Sarawak Land Code ('the Code') a direction cited as 'Arahan Tanah (Hak-Hak Adat Bumiputra (No 51) 2001 ('the Direction') dated 15 May 2001 published in Sarawak Government Gazette dated 14 March 2002 under Gazette Notification No GN 677/2002 that came into force on 29 January 2002. The plaintiffs claimed that the Direction extinguishes all the plaintiffs' native customary rights over the said land that comprises an area of 136.8 hectares, more or less, which is delineated on Plan No 2/9D/6/0/1 ('the Plan'). By the Direction the said land was reverted to, and acquired by, the Government of Sarawak. Plaintiffs claimed, in para 7 of the statement of claim, that the said land includes both the individual and part of the communal native customary land.

[3] The plaintiffs claimed that the Direction contravenes or offends rules of natural justice, art 39 of the Sarawak State Constitution, arts 5(1), 8(1), 13(2) and 153 of the Federal Constitution. The plaintiffs also claimed that they have legitimate expectation of uninterrupted, quiet and peaceful enjoyment of their customary rights over the said land which they claimed as their native customary land.

[4] Therefore the plaintiffs claimed in prayer (i) for a declaration that they have native customary rights over the said land and are still the lawful proprietors thereof. In prayer (ii), the plaintiffs claimed for a declaration that the defendant or its servant or agent is precluded, by the existence of these native customary rights, from impairing or abridging the rights. In prayer (iii) the plaintiffs claimed for a declaration that the Direction have impaired or abridged their native customary rights over the said land. In prayer (v) the plaintiffs claimed for a declaration that by such impairment and abridgment the plaintiffs have suffered loss and damage. In prayer (iv) and prayers (vi)-(ix) the plaintiffs claimed for a declaration that the Direction is bad in law and therefore null and void for contravening arts 5(1), 8(1) and 13(2) of the Federal Constitution.

THE DEFENDANT'S APPLICATION

[5] By a summons-in-chambers dated 15 September 2003 the defendant applied ex-parte (encl 4) for leave to enter conditional appearance; and this was granted by the Deputy Registrar on the same date. Pursuant to the leave given, the defendant filed a summons-in-chambers dated 24 September 2003 (encl 7) to strike out the plaintiffs' writ and statement of claim under O 18 r19 and O 92 r 4 of the RHC 1980. In the alternative the defendant prays that it be permitted to file and serve the defence within 30 days of the order made therein. The main ground for the defendant application in encl 7 is that the plaintiffs' writ action and statement of claim is an abuse of process of the court principally because the plaintiffs' action seeks to challenge the Direction issued by the Minister for Planning and Resources Management under s 5(3) and (4) of the Code which extinguishes the alleged native customary rights of the plaintiffs over the said land covered by the Direction. Thus the defendant says that the plaintiff is seeking public law remedies and therefore ought to proceed by way of judicial review under O 53 of RHC 1980.

[6] The defendant's application was supported by an affidavit of Datu Haji Hamzah bin Haji Draman, the Permanent Secretary to the Ministry of Planning and Resources Management, affirmed on 19 September 2003 ('Hamzah's affidavit').

THE OPPOSITION BY THE PLAINTIFFS

[7] The plaintiffs oppose the application and had filed an affidavit in opposition by TR Kesiaw ak Unggang affirmed on 3 October 2003 ('Kesiaw's affidavit').

[8] In para 3.2 of Kesiaw's affidavit the plaintiffs averred that the plaintiffs are claiming for declarations, general damages and alternatively compensation, interest and costs founded on several causes of actions namely breach of natural justice, breach of art 39 of the Sarawak State Constitution and breach of arts 5(1), 8(1), 13(2) and 153 of the Federal Constitution. In para 3.3 of the same affidavit plaintiffs contended that an application for certiorari as suggested by the defendant is only for the purpose of quashing the allegedly impugned Direction. So in para 3.4 of Kesiaw's affidavit the plaintiffs averred that they were advised by their advocates that their claim for declarations and damages cannot be pleaded by way of judicial review. It was also contended in the affidavit that there is no legal provision that prohibits the plaintiffs from challenging the Minister's decision or the Direction by a writ action. In para 4.1 of Kesiaw's affidavit the plaintiffs also challenged paras 7 to 9 of Hamzah's affidavit, and in particular para 7 of Hamzah's affidavit saying that the particulars of land referred to and identified as F/L 11 in the said land and the Plan is his (ie Kesiaw) own temuda; whereas the plaintiffs' claim relates to communal rights and communal claim shown in exh 'KAU-2'. Therefore, the plaintiffs contended that the land identified as F/L 11 had nothing to do with the claim and thus the facts deposed in paras 7 to 9 of Hamzah's affidavit are misconceived.

SUBMISSIONS BY DEFENDANT ON ITS APPLICATION

[9] In advancing the case for the defendant to strike out the writ and the claim, Mr Jonathan Jolly the learned state legal officer ('SLO') for the defendant, submitted that the plaintiffs are principally challenging the Direction on the ground that the same was allegedly made in breach of natural justice and of their fundamental rights guaranteed under the Federal and State Constitution which have been violated. It was argued that the plaintiffs grounded their cause of action on four main platforms, namely the breach of rules of natural justice; the illegality and unconstitutionality of the Direction, the violation of fundamental liberties and the acquisition or creation of native customary rights. It was also submitted that the plaintiffs, by their prayers seeking declaration to expunge the Direction that affects the said land and their native customary rights, are in fact questioning the validity and constitutionality of the Direction issued by the Permanent Secretary of the Ministry for Planning and Resources at the behest of the Minister. This, it was submitted, is a challenge to the authority of the Minister and therefore it is an issue of public law. Therefore it must be determined according to the appropriate forum or avenue and process. It was submitted that the appropriate process to challenge the Ministerial authority to issue the Direction hence to declare it as invalid is by way of judicial review and not by ordinary writ action. He cited the case of *Majlis Perbandaran Pulau Pinang v Syarikat Berkerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 MLJ 1, as authority for this proposition. It was further submitted that to allow the plaintiffs to proceed as they have done is to abuse the process of the court.

[10] The learned SLO states several reasons to explain the abuse of process of court. Firstly, the alleged plaintiffs' native customary rights were purportedly acquired from persons who had created the rights before 1958 according to the customary laws or customs that were given recognition by statute by virtue of s 66 of the Land Settlement Ordinance 1933 (which is also known as the Rajah Order L-7 of 1933).This was later replaced by s 5(2) of the Sarawak Land Code ('the Code'). Learned SLO then referred to *Black's Law Dictionary* (7th Ed) on the definition of 'public law' which defines it to mean 'the body of law dealing with the relations between private individuals and the government and with the structure and operation of the government itself; constitutional law, criminal law and administrative law taken together.' It was submitted that by this definition the plaintiffs' claim is in the realm of public law because the plaintiffs' native customary rights, which were acquired through customary practices and given statutory recognition, are affected by the operation of the government itself — that is by the making and the publication in the Gazette of the Minister's Direction that extinguishes those rights. Secondly, on the plaintiffs' pleadings the plaintiffs are alleging that the making and publication of the Direction that extinguishes their customary rights is an abuse of power or an error of law or a breach of natural justice as well as breach of fundamental liberties enshrined in Pt II of the Federal Constitution and the relevant provisions within the State Constitution and such an act is tainted with illegality. It was submitted therefore that such issues ought to be dealt with by way of judicial review ie to review the Minister's Direction that affects the plaintiffs' rights. Thirdly, the learned SLO reasoned that by the pleadings in paras 7.1 and 7.2 of the statement of claim, the plaintiffs are aggrieved and dissatisfied with the defendant's decision not to accord the plaintiffs with the right to be heard prior to the extinguishment of their rights by the Minister's Direction under s 5(3) and (4) of the Code. It was submitted that in such a case, the plaintiffs ought to proceed by way of judicial review under O 53 of RHC 1980 to have the Minister's Direction quashed. Fourthly, there is already forum under the Code, in particular s 5(4)(a)(i) which expressly states that where any person is dissatisfied with any decision of the Superintendent under sub-s (3) on the ground that his claim to native customary right has been rejected or not recognized then it may be referred to arbitration pursuant to s 212 of the Code read together with ss 6 and 32 of the Arbitration Act 1952.

[11] Learned SLO further submitted that where the redress in respect of public law is sought, the proper remedy would be judicial review. He cited and relied on a passage in *O'Reilly v Mackman* [1983] 2 AC 237 found at p 238 of the report. He submitted that the plaintiffs are seeking a declaration that they do possess rights over the land and another declaration seeking amongst others that the Minister's Direction or Notification made under s 5(3) and (4) of the Code is null and void and of no legal effect. He argued that the Minister who has jurisdiction over land matters has the authority to make the Minister's Direction or Notification. Therefore if the plaintiffs seek to challenge the validity

of the Direction or Notification that they claimed extinguishes their rights over the Land, the plaintiffs must apply to have the Direction or Notification quashed.

[12] Learned SLO then submitted that the plaintiffs must apply to quash the Direction or Notification within 40 days after the grounds for the application arose or the Direction or Notification was communicated to the plaintiffs. Inthis case it was submitted that the Direction was made in May 2001 and gazetted in January 2002. The plaintiffs suit was filed on 14 July 2003 — well after the 40 days period allowable under O 53 r 3(6). It was submitted that the plaintiffs were out of time to apply for a judicial review of the Minister's Direction. It was further submitted that the plaintiffs therefore cannot circumvent the rule by applying for declaration by way of writ action to quash the Minister's Direction — something that ought to be done by way of judicial review. Learned SLO cited *Yahya Bin Kassim v Government of Malaysia* [1997] 3 MLJ 749 in support of his proposition.

[13] It was submitted that the plaintiffs were aware of the Direction or the Notification which had came into force on 25 January 2002. Learned SLO submitted that the Direction and Notification was published in a local daily of Sarawak Tribune and also in the Government Gazette. He further submitted that pursuant to the notification of the extinguishment of the native customary rights over the land by virtue of the Direction, one of the plaintiffs, that is Tuai Rumah Kesiaw ak Unggang had subsequently submitted his claim to the defendant through its servant the Superintendent of Lands and Surveys, Bintulu and was later compensated with monetary compensation. It was submitted that the evidence of this is to be found in exhs HHD–1 and HHD–2 to Hamzah's affidavit, filed in support of the defendant's application. But, it was submitted, the plaintiffs made no attempt to apply for judicial review of the Minister's Direction on becoming aware of it. It was argued that when the plaintiffs discovered that they were out of time for judicial review the plaintiffs decided to proceed by way of ordinary writ action. Learned SLO submitted that that is an abuse of court process.

[14] He then submitted that where the application is an abuse of process, the court may strike down the application. He cited O 18 r 19 (1)(d) of RHC 1980. He also relies on O 92 r 4 of RHC 1980. Citing the case of *Subramaniam a/l Vythilingam v The Human Rights Commission of Malaysia (SUHAKAM) & Ors* [2003] MLJU 94 as authority, the learned SLO submitted that by deliberately attempting to circumvent the stringent mandatory requirements of O 53 of RHC 1980 in pursuing their public law remedies by way of ordinary writ action, the plaintiffs' act constitutes an abuse of the process of the court. Again relying on *Subramaniam*'s case and also the case of *Malaysia Building Society Bhd v Tan Sri General Ungku Nazaruddin bin Ungku Mohamed* [1998] 2 MLJ 425 the learned SLO urged the court to strike out the plaintiffs' writ and statement of claim.

SUBMISSIONS BY THE PLAINTIFFS IN OPPOSING THE APPLICATION

[15] The first submission by Mr Paul Raja, learned counsel for the plaintiffs, is that the defendant has got the identification of the land wrong. He submitted that the land claimed by the plaintiffs is the area marked on the map exhibited as exh KAU–2 annexed to the Kesiaw's affidavit filed by the plaintiffs in opposition to the defendant application. He submitted that the land is located at KM 22 Bintulu-Tatau Road and identified as F/L Hutan Tua on the map. He further submitted that that is the land that the plaintiffs identified in their writ. It was submitted that the defendant, in its application to strike the plaintiffs' writ and statement of claim, has identified the land as F/L 11 as shown in exh HHD–1 to Hamzah's affidavit. Learned counsel for the plaintiffs submitted that is not the land claimed by the plaintiffs. He further submitted that the land F/L 11 is an individual plot belonging to the second plaintiff personally, Learned counsel for the plaintiff submitted that on this ground alone the defendant application should be dismissed.

[16] The second submission by the learned counsel for the plaintiffs is that the plaintiffs' claim in the suit is not subject to O 53 of RHC 1980 if the Rule is read with the provisions in the Specific Relief Act 1950 (Act 137) ('the Act'). He argued that under O 53 r 1(2) the application of the rule is subject to the provisions of Chap VIII of Pt 2 of the Act. That part of the Act deals with the enforcement of public duties. He submitted that 'all such actions with regards the enforcement of public duties' and falling under Chap VIII (observing ss 44 to 49) of the Act 'have to proceed by way of O 53'. However he also submitted that the 'procedural exclusivity of O 53 may still be opened to discussion.' Hesubmitted that in this case the plaintiffs are asking for certain declaratory relief. If the plaintiffs were successful, the court may order the defendant to do or to forebear from doing certain act that would affect the plaintiffs' rights. He argued that such order would fall under the 'enforcements of public duties' under Chap VIII of Pt 2 of the Act. But, the learned counsel for the plaintiffs argued, the order to enforce the carrying out of the public duties in this case is on a collateral issue. The principal issue is the claim for the infringement of the rights of the plaintiffs for which the declaratory relief is sought. Learned counsel for the plaintiffs then referred to Chap VI of Pt 2 of the Act that deals with declaration decrees and in particular s 41 on the discretion of the court as to declaration of status or right. He submitted that the plaintiffs' prayer for the declaration of their native customary rights over the land in their claim falls under illustration (c) of s 41 of the Act or analogues to such illustration. Therefore the plaintiffs' claim is not under Chap VIII of Pt 2 of the Act; hence the procedural rules to be observed are not under O 53 of RHC 1980. He then cited the case of *Attorney-General of Hong Kong v Zauyah Wan Chik & Ors and Another Appeal* [1995] 2 MLJ 620 as authority for the proposition that the court has the power to grant declaratory relief under s 41 of the Act as well as under the court's power of inherent jurisdiction by virtue of its additional

powers in the Schedule to the Courts of Judicature Act 1964 ('the CJA') pursuant its s 25 and that the applicable procedure is O 15 r 16 of RHC 1980. In the *Attorney-General of Hong Kong* case, it was also held that the nature of declaratory relief that can be granted by the court under s 41 of the Act is not exhaustive. Thus it was the learned counsel for the plaintiffs' submission that the plaintiffs' prayer of the declaration of their natives' customary rights over the land could well fall under the provision of that section.

[17] Learned counsel for the plaintiffs also cited several other cases namely *Asia Pacific Parcel Tankers Pte Ltd v The Owners of the Ship or Vessel 'Normar Spendour'* [1999] 6 MLJ 652; *Ladang Tai Tak (KT) Sdn Bhd v Suppiah Andy Thavar & Ors* [1999] 5 MLJ 257 which held that s 41 of the Act is not exhaustive. Thus he submitted that a declaratory decree that falls outside the scope of s 41 of the Act would not be governed by O 53 but by O 15 r 16 of RHC 1980. Hesubmitted that Chap VI, under which Chap s 41 of the Act is found, and Chap VIII of the Act are independent of each other and mutually exclusive in their procedural provisions and rules.

[18] Learned counsel for the plaintiffs also referred to *Janab's Key to Civil Procedure In Malaysia and Singapore* (2nd Ed) cited in *Ladang Tai Tak* which in turn made reference to a book entitled *Declaratory Orders* (2nd Ed) by Young and submitted that six factors must be present before there can be a declaratory order. The six factors cited are: (1) there must be controversy between the parties; (2) the proceedings must involve a 'right'; (3) the proceedings must be brought by a person who has a proper or tangible interest in obtaining the order, which is usually referred to as 'standing' or 'locus standi'; (4) the controversy must be subject to the court's jurisdiction; (5) the defendant must be a person having a proper or tangible interest in opposing the plaintiff's claim; and (6)the issue must be ripe, ie it must not be academic interest, hypothetical or one whose resolution would be of no practical utility. Learned counsel for the plaintiffs further submitted that in determining whether the action by the plaintiffs may amount to an abuse of the process of the court, the court is only concerned whether on prima facie basis all the six ingredients as stated are present and fulfilled. He submitted that if the court is satisfied to that effect then the plaintiffs' claim should be allowed to go to trial and not struck off at this stage. He also submitted that since the declaratory relief sought by the plaintiffs is not pertaining to the 'enforcement of public duties' Chap VIII of the Act is not applicable and therefore the question whether the plaintiffs' action should be brought by way of an application for judicial review under O 53 of RHC 1980 and that by resorting to a writ action would amount to an abuse of the process of the court does not and should not arise.

[19] The third submission by the learned counsel for the plaintiffs is that the plaintiffs' case is outside the scope of judicial review under O 53 is premised on the argument that para 1 of the Schedule to Courts of Judicature Act 1964 is concerned with the prerogative writs of the nature of habeas corpus, mandamus,

prohibition, quo warranto and certiorari, or any others, for the enforcement of rights and declaration is not specifically mentioned or provided in that paragraph. It was submitted that a declaration is not a prerogative writ of the nature specified in para 1 of the Courts of Judicature Act 1964. A declaration has no coercive force; it does not enforce a right. A declaration merely declares the rights of the parties. It was further submitted that though O 53 r 2(2) allows an applicant for a judicial review to apply a relief in the nature of a declaration, such relief is given only as ancillary to the judicial review in appropriate cases. It was submitted that a judicial review is concerned with the proper exercise of power by a public authority or a public body or a public officer vested in such authority, body or officer by law. It is concerned with the decision making process — its legality, constitutionality and propriety — rather than the decision itself. Learned counsel cited passages from *Hilaire Barnette, Constitutional And Administrative Law* (3rd Ed) (2000) and referred to the case of *Associated Provincial Picture Houses v Wednesbury Corp* [1947] 2 All ER 680 and *Council of Civil Service Union & Ors v Minister for Civil Service* [1984] 3 All ER 935 in support of this submission. It was argued therefore that the plaintiffs' case is not challenging the decision making process. But is seeking a declaratory relief as to their proprietary rights by mounting a frontal challenge on the constitutionality of specific provisions of the Sarawak Land Code (Cap 81) together with a challenge to the Direction issued thereunder on the ground of unconstitutionality and illegality. Thus a judicial review, it was submitted, is inappropriate in the circumstances.

[20] The fourth submission by the learned counsel for the plaintiffs is that the plaintiffs are caught in a most precarious position in that if they apply for judicial review, most likely the plaintiffs would not be given leave to do so. The reason being that under s 5(4) of the Code a party who is dissatisfied with the decision of the Superintendent inter alia on the ground of his claim to native customary rights have been rejected or not recognized by the Superintendent, may within 21 days from the date of receipt of the decision of the Superintendent request the Superintendent to refer the matter to arbitration under s 212 of the Sarawak Land Code. It was submitted therefore that availability of reference to arbitration under s 212 of the Code constitute an alternative remedy to the plaintiffs. It was thus submitted that in the circumstance of such alternative remedy leave for judicial review would likely not be given to the plaintiffs until the plaintiffs have exhausted the statutory rights to refer to arbitration.

[21] The fifth submissions by the learned counsel for the plaintiff is that O 53 of RHC 1980 is not an exclusive remedy for cases in which an administrative order or act is challenged directly, or collaterally in action for tort or contract and in other cases which essentially involve the exercise of public powers. Heargued that though in the case of *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2002] 2 MLJ 413 the Court of Appeal had expressed the view that 'if it is not clear whether judicial review or an ordinary action is the correct

procedure it will be safer to make an application for judicial review than commence an ordinary action' and that 'if judicial review is used and when it should not the court can protect its resources either by directing that the application should continue as if begun by writ or by directing it should be heard by a judge who is not nominated to hear cases in the Crown Office List', there is no assurance in the rules that trial court would follow the suggestion by the Court of Appeal in that case. He submitted that that is so because the view by the Court of Appeal was expressed with reference to changes made to the English O 53. But, learned counsel submitted, there is a difference between our O 53 and its English counterpart. He says the English O 53 contains r 9(5) which empowers the court to order the proceedings under judicial review to continue as if it has been begun by writ, instead of refusing the application in circumstances where the court thinks that the application for judicial review is inappropriate. Our O 53, learned counsel submitted, does not have such provision. Thus it was submitted that the plaintiffs in this case would not have the same safeguards as found under r 9(5) of the English O 53. In this regard it is the submission of the counsel for the plaintiffs that our O 53 r 2(2) which provides that an application for judicial review may seek any of the said reliefs, including a prayer for a declaration, either jointly or in the alternative in the same application if it relates to or is connected with the same subject-matter is only to enable the application for judicial review to pray for declaratory relief as ancillary or additional relief and to enable the court to grant declaratory relief if it is deemed appropriate, as example, for the granting of injunction or monetary compensation, provided under O 53 r 2(3). For that reason, the learned counsel for the plaintiffs submitted, the action should not be struck out for being an abuse of process of court.

[22] It is also the submissions by learned counsel for the plaintiffs that judicial review is unsuitable for trying questions of facts. It was submitted that the plaintiffs' case would require evidence of facts of the history of the Iban settlements in RH Lampoh in particular that of the vicinity of Sungai Mas, their customary practice with regards to acquisition, control and inheritance of land rights, title or interests, the relation of land to their livelihood and in most cases a crucial constituent of their cultural survival and worldwide. Itwas submitted that such questions of facts could not be resolved through affidavits as required under O 53 for judicial review and more suitable to be determined at the trial of the action.

[23] It was also submitted for the plaintiffs that rigid dichotomy between private and public should not be encouraged or practiced lest a party with a good case could lose the case by choice of wrong procedure before its merits come before the court. Learned counsel for the plaintiffs cited and quoted extensively passages in Chap 18 — Procedures of Judicial Review — from the book *Administrative Law (7th Ed)* (published by Oxford-Claredon Press) by Sir William Wade and Christopher Forsyth on the defects of prerogative remedies,

A the problems associated with the dichotomy of private and public law and the need for reforms. In this regard learned counsel for the plaintiffs also referred to the judgment of the learned Justice Gopal Sri Ram JCA in *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2002] 2 MLJ 413. Learned counsel submitted that it was refreshing to note that in that case the court expressed the view
B that in this day and age judges should decide cases according to the law and their substantive merits rather than to dispose them on purely technical and procedural grounds.

[24] Learned counsel for the plaintiffs then submitted that the plaintiffs' case falls into one of the exceptions pronounced by Lord Diplock in *O'Reilly*
C *v Mackman*. For the analysis of these exceptions learned counsel referred and quoted extensively from the book *Application for Judicial Review — Law and Practice* by Grahams Aldous and John Alder (1985 Ed) (London-Butterworths). Learned counsel submitted that one of the exceptions involves cases where the validity of a decision arises as a collateral issue in a claim for infringement
D of a right of the plaintiff under private law. Relying on the passages in the said book, learned counsel pointed out to the case of *R v Jenner*[1983] 2 All ER 46 where the court allowed the validity of a stop notice issued by a local council under the Town and Country Planning Act 1971 to be challenged by way of defence in a criminal proceedings. He also pointed out to the case of *Wandworths London BC v Winder* [1984] 3 All ER 976 where the House of Lords the issue
E of public law to be raised by way of a defence. There are other cases in the passages quoted by the learned counsel from the book that show that the court had allowed collateral challenge being taken against decision grounded on public law. (See *Davey v Spelthorne BC* [1984] AC 262; *An Board Bainne Co-operative Ltd (Irish Dairy Board) v Milk Marketing Board* [1984] 2 CMLR 584.) Learned counsel
F submitted that the plaintiffs' case falls into this exception because the plaintiffs' action is primarily for declaration of their private rights to specific parcels of lands and their challenges to the specific provisions in the Code and the validity of the Direction are collateral issues.

[25] The other exception to the principle in *O'Reilly v Mackman*, learned counsel
G submitted, is where there is no objection taken by a party to the procedure adopted. But this exception is not applicable in the instant case since the defendants had taken objection on the point of procedure.

[26] Learned counsel for the plaintiffs also argued that where a party is trying to enforce a private rights against a public body, he or she may do so
H under an ordinary action. He further argued that the mere fact that the defendants are public bodies does not necessarily change the private law rights into public law rights and a claim in private law into that of public law. And that a litigant whose claim for his private rights incidentally involves the examination of public law issue should not be prevented in establishing his private rights by
I ordinary action. On this point, learned counsel for the plaintiffs cited a passage in the judgment of Lord Bridge in *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee* [1992] 1 All ER 705 which reads:

> But, it is important, as I believe, to maintain the principle, it is certainly no less important that its application should be confined within proper limits. It is appropriate that an issue which depends exclusively on existence of a purely public law right should be determined in judicial review proceedings and not otherwise. But where a litigant asserts his entitlement to subsisting right in private law, whether by way of claim or defence, the circumstance that the existence and extent of the private right asserted may incidentally involve the examination of a public law issue cannot prevent the litigant from seeking to establish his right by action commenced by writ or originating summons, any more than it can prevent him from setting up his private law right in proceedings brought against him.

[27] Learned counsel for the plaintiffs therefore submitted that the principles regarding the dichotomy between public law and private law pronounced in *O'Reilly v Mackman* and the procedures to be adopted in cases of a mixture of public and private law issues should be given a broad approach and a more liberal and flexible interpretation so as not to defeat a good case purely on the ground of technicality and wrong application of procedures. Learned counsel for the plaintiffs submitted that in England the narrow approach on the choice of proceedings relating to the issue of public and private law proceedings taken in the case of *O'Rourke v Camden London Borough Council* [1977] 3 WLR 86 by the House of Lords was criticized in a later case of *Trustees of the Dennis Rye Pension Fund & Anor v Sheffield City Council* [1997] 4 All ER 747 by Lord Woolf MR of the House of Lords. Learned counsel urged the Court to take heed of the development of this branch of the law in England and to learn the lessons therefrom and to guard against importing such rigid procedures and technical rules as to forms.

[28] Finally, learned counsel for the plaintiffs reminded that although the defendant claimed that the plaintiffs are trying to enforce a public right, the Minister, on whose Direction the right was affected, was never joined as a party to the action.

FINDINGS AND OPINIONS BY THE COURT

[29] On the plaintiffs' counsel submissions as to the identification of the land — the subject matter of the application — I find that there are no merits to it. In para 4 of the plaintiffs' statement of claim filed together with the plaintiffs' writ of summons, the plaintiffs claimed both individual and communal native customary rights over the land. The particulars of the land over which the plaintiffs claimed their native customary rights were described in the statement of claim as follows:

> The said land is a portion of our communal native customary rights of our long houses, namely, Rumah Lampoh and Rumah Kusau and is part of our Pemakai Menoa. The area of our Pemakai Menoa which was fixed by our forefathers and recognized by the previous Governments was that the area of land between the two rivers, namely, Sg Mas and Sg Selat. The boundary of the said communal

native customary rights land starts at the mouth of Sg Mas and going upriver until its upper reaches and continues in curve line to include the headwaters of several tributaries of Sg Segan. From the upper reaches of Sg Mas, it curves southeast crossing Sg Sengab and then southward crossing Sg Selungun to Sg Nivong and then it turns in southwesterly direction and then cross Sg Sapulau and still in the southwesterly direction until the bank of Sg Jengin somewhere in the middle of its course. From there it follows Sg Jengin upstream until its upper reaches and it continues generally southwesterly along the slope about halfway between the peak and the foothill until it meets the bank of Sg Jepai. From there it follows Sg Jepai upstream in a northwesterly curve line following the mountain peaks until it meets the upper reaches of Sg Selat. From there it follows the river down stream until its mouth at the sea. From there it follows the sea coast northeasterly until the starting point at Kuala Sg Mas.

[30] The area contains in the above description at para 4 of the plaintiffs' statement of claim is identified by red edging on the map or plan attached to the statement of claim. The plaintiffs did not state, either in their statement of claim or in the Affidavit In Opposition by TR Kesiaw Ak Ungang affirmed on 3 October 2003, the size of the land they claimed as their native customary land and which has been described above. But the plaintiffs do not deny that the land they claimed as their native customary land is included in the 136.8 hectacres more or less situated at KM 25 Bintulu/Tatau Road and more particularly delineated on Plan Print No 2/9D/6/0/1, affected by the Minister's Direction that is under challenge. Reference to land F/L11 in para 7 of Hamzah's affidavit is only to show that the plaintiffs as occupants of the Rh Lampoh and Rh Kusau were aware of the Minister's Direction. The land that covered the area claimed by the plaintiffs has been identified in the plan referred to in the Direction and plaintiffs are not disputing this. In fact it is because the land over which the plaintiffs claimed natives' customary rights is included in the plan that the plaintiffs commence this action. And land F/L11 is part of the plan, this is not denied by the plaintiffs.

[31] On the plaintiffs' pleadings in their statement of claim and with regard to the learned counsel submissions as to the nature of relief sought by the plaintiffs vis-a-vis the applicability of O 53 the issues raised in the defendant application in encl (4) may be stated as follows. One, are the natives customary rights protected by public law hence making them a public law issue. Two, are the rights being infringed by public act of a public body or office. Three, in seeking remedies for such infringements, if there are any, can the plaintiffs do so by way of ordinary action instead of proceeding under O 53 of RHC 1980. Four, if the plaintiffs proceed by way of O 53 of RHC 1980 would the plaintiffs be prejudiced in that the court would be constrained in granting the remedies the plaintiffs are seeking.

[32] All the issues, except for issue No 4, in this case have been raised and canvassed in a similar case before the learned Skinner J in a Civil Suit No 22–142–2002–1 (now reported in *Shaharuddin bin Ali & Anor v Superintendent of*

Lands and Surveys Kuching Division & Anor [2005] 2 MLJ 555) in the High Court of Sabah and Sarawak sitting at Kuching. In his written judgment (unreported) dated 25 August 2004 the learned judge found that the plaintiffs in that case claimed that they had acquired native customary rights over certain areas of land situated between Loba Rambungan and Kubah National Park containing approximately 23.06 hectacres. The plaintiffs purported natives customary rights were affected by a similar Minister's Direction which was gazetted in the Government Gazette on the 14 November 2001 that extinguished the natives customary rights over the said land. The Minister's Direction in that case was made under the same s 5(3) and (4) of the Sarawak Land Code. In that case the plaintiffs also sought a declaration that they had natives customary rights over the land and in the course of doing so, the plaintiffs also mounted an attack against the Minister's Direction that had extinguished the rights and arguing that the Direction was null and void.

[33] In that same case, the learned judge concluded that natives customary rights are rights protected by public law. The learned judge reasoned that:

> ...it appeared to me that what the plaintiffs were really trying to do by instituting this suit was to impugn the Direction issued by the Minister extinguishing their native customary rights over the said lands and impugn the decision of the Superintendent as well in rejecting their claims for compensation in respect of the extinguishments of their alleged
>
> rights, on the grounds of alleged error of law, breach of the rules of natural justice, illegality, unconstitutionality and violation of their fundamental liberties. If that was the case then the plaintiffs were in fact seeking to review and to have the decision of the Minister and the Superintendent quashed, a matter which is governed by O 53 Rules of the High Court 1980 ('the RHC')

(See p 6 lines 15–26 of the written judgment.)

[34] At pp 13-15 of the same judgment the learned judge expressed the views that the Minister and the first defendant in that case acted under powers conferred upon them by s 5(3) of the Code, and are public authorities whose decisions are subject to supervisory control of the court through process of judicial review under O 53 of RHC. Then the learned judge went to say that the plaintiffs natives customary rights are recognized by statute and protected by public law by virtue of s 5(1) and (2) of the Code. In the learned judge own words:

> So although the plaintiffs say that the native customary rights which they claim to have acquired (through person who had created those rights before 1958) are proprietary in nature, the fact remains that the rights which they claim are rights created or recognized by statute, or put it another way, they are rights protected by public law. The plaintiffs alleged native customary rights do not arise out of any private contract or arrangement between the plaintiffs and the Government (defendants here), or put in another way, there is no infringement of a right of the plaintiffs arising under private law.

[35] In my opinion the views expressed by the learned judge in the case of *Shaharuddin bin Ali* are pertinent and equally applicable to the instant case which involve similar facts and issues. I would therefore have no hesitation in adopting those views.

[36] It is true that the plaintiffs are asking for declaratory relief and alternatively for compensation. But on the pleadings this is not the main thrust of the plaintiffs' claim. The plaintiffs claim that their NCR were created and enjoyed by their forefathers and now passed to them. The NCR is not registered if it is created before 1 January 1958. But if it is created after that date there is a possibility of evidence of approval or permit given under s 6 or 10 of the Code. For that reason the Code has provisions of presumption against the existence of NCR over state land in the event of a dispute. The burden is on the claimant to prove the existence of NCR. In this particular case, the very fact that the defendant issued the Direction to extinguish the NCR over the said land is in itself a proof that the defendant recognizes that NCR could have existed on the said land. It could be over the whole area of the said land that is covered by the Direction or it could be within pockets of lands within the area. For that reason the Direction provides that any claimant of NCR to submit their claim within 60 days from the date of the publication in the Gazette of the Direction. The plaintiffs claimed that their NCR was impaired and abridged by the Direction. The Code does not have provision which prohibits the defendant from extinguishing NCR. But if the NCR is extinguished, appropriate compensation must be provided for. This has been complied with by the defendant in the said Direction. However the plaintiff claimed that the Direction was null and void and bad in law because it contravenes various articles of the Federal and State Constitutions. So in short the declaration sought by the plaintiffs on the NCR would be meaningless if the plaintiffs also do not set aside the Direction. This is so because for so long as the Direction remains standing and not declared void the effect is it will extinguish the NCR on the said land. In other words, plaintiffs' declaration of NCR cannot coexist with the Direction remains intact. Thus the challenge to the Direction becomes a core issue to the plaintiff case and not by a side wind. In order to preserve the NCR the plaintiffs must take the bull by its horn that is to say the plaintiffs must mount a frontal attack against the Direction issued. Since the issuing of the Direction is an act of a public body or authority in the form of the Minister for Planning and Resources Management the plaintiffs must proceed under O 53 of RHC 1980. In order to have the Direction quashed the plaintiffs must apply for an order of certiorari, the Direction being an administrative act of a public authority. To move the court for such an order the plaintiffs must proceed under O 53 of RHC 1980. In my view it is wrong for the plaintiffs to seek a relief in a declaratory order for their NCR and then pray for a consequential order that the Minister's Direction be quashed. Toallow that means to allow the plaintiffs to circumvent O 53 of RHC 1980 and all the protections afforded by it to the defendants. For that same reasons, I

think the learned counsel for the plaintiffs' arguments on Chap VI of Pt 2 of the Specific Relief Act 1950 (Act 137), particularly on s 41 of the Act, is irrelevant and misconceived.

[37] I have come to that conclusion even though learned counsel for the plaintiffs had submitted that the dichotomy between private law and public law should not be taken to the extreme; lest a plaintiff with a good cause may be defeated for failure to follow the correct procedure of moving the court. That, he submitted, would be gross injustice and ought not to be allowed. The current trend, he further submitted, is to do substantial justice; not merely procedural justice. This, he says, is evident with the amendment to the RHC 1980 in 2002 with the introduction of the new rule in the form of O 1A which requires a judge to have regard to the justice of the particular case and not only to the technical non-compliance of the rules.

[38] To support his submissions on this point learned counsel for the plaintiffs has referred, as I have alluded to above, to the current development in England where criticisms have been made against such approach towards procedural exclusivity that leads to rigidity and procedural hardship for the plaintiffs in the choice of forms of action.

[39] In my opinion the creation of O 53 in the RHC 1980 is for a purpose.

[40] It is there not as an ornament to adorn the pages of the Rules book. Itis there to provide for specific procedures in cases where the act or decision of a public body or public authority under a public statute is being challenged. As I have said above O 53 provides certain protections to the public body or authority when their public act or decision is being challenged. One of these protections is the time limit within which the challenge to the public act or decision must be made. The court may take judicial notice that a public act or decision would have consequences which affect some person or body of persons either by altering rights or obligations of that person which are enforceable by or against him in private law or by depriving him of some benefit or advantage which he either had enjoyed in the past or had legitimate expectation to continue to have enjoyed it. For that reason the public decision maker must be able to know in the shortest possible time whether its decision is going to be challenged or not. If it is challenged, then the public body or authority would be accorded the opportunity to resist the challenge and explained its action or decision at the earliest available opportunity that is at the leave stage. That I think is the rationale for the limitation in the time accorded by the rules to challenge the public decision. Therefore if the plaintiffs choose to challenge the act or decision of the public body or public authority under a public law by resorting to other forms of action than an action for judicial review under O 53, it would be an abuse of process. In *Subramaniam a/l Vythilingam v The Human Rights Commission of Malaysia (Suhakam) & Ors* [2003] MLJU 94 the court held that:

The plaintiff's cause of action lies in public law and not in private law. The orders prayed for are in the nature of a mandamus and the prayers seeking damages are in the nature of ancillary prayers. The plaintiff should have pursued his public law remedy through judicial review proceedings under O 53 of the RHC and not by way of originating summons. The plaintiff was deliberately attempting to circumvent stringent mandatory requirements as provided for by O 53 of RHC as the plaintiff would have to apply for leave of court, the application for review would have to be filed within 40 days from the date when the grounds of the application first arose and the plaintiff would have had to serve his leave application on the attorney-general's chambers. The plaintiffs originating summons constitutes an abuse of the process of the court and should be struck out.

[41] Likewise in this instant case, the plaintiffs were deliberately attempting to circumvent the stringent mandatory requirements of O 53 by filing this suit to challenge the Ministerial Direction. It would seem so because it is obvious that the plaintiffs were clearly out of time as regard the 40 days time frame provided by the rules to file for judicial review at the time the suit was filed. Furthermore the plaintiffs have not obtained any leave, and neither have the plaintiffs applied and granted any extension of time to file for judicial review after the 40 days time limit.

[42] A judicial review also would be an appropriate route to follow if the grounds for the application involve consideration of generalised principles of public law developed by the courts to control the exercise of power of public authorities — see the case of *Majlis Perbandaran Pulau Pinang v Syarikat Berkerjasama-sama Serbaguna Sungei Gelugor dengan Tanggungan* [1999] 3 MLJ 1. The plaintiffs in this suit pray for declaration that the Minister in issuing the Direction had acted unconstitutionally and had infringed the rules of natural justice. These are the issues alluded to by the Federal Court in the *Majlis Perbandaran Pulau Pinang* case that involve consideration of the generalised principles of public law. Thus on the authority of that case, the plaintiffs' suit is also an abuse of process.

[43] With regard to the issue of dichotomy between private law and public law, it is to be noted that Skinner J in *Shaharuddin bin Ali* case had observed that 'the Courts in Malaysia have for a long time now recognized the distinction between public law rights or remedies and private law rights or remedies.' The learned judge then went on to cite a number of cases, at p 19 of his written judgment, to show this. I agree with his observation. In my opinion insistence on strict compliance with O 53 in appropriate cases does not create rigidity and procedural exclusivity leading to dual system of law as submitted by the learned counsel for the plaintiffs. Order 53 is an adjectival law. It provides for procedures where a challenge is made against a public act or a public decision by a public body or authority. In this sense O 53 is no less exclusive when compare to the procedures for writ or originating summons. Moreover under the present O 53 the plaintiffs may obtain prayers which at one time could only be obtained through ordinary writs proceedings. In *Sivarasa Rasiah v Badan*

Peguam Malaysia & Anor [2002] 2 MLJ 413, the Court of Appeal said, at pp705–706, that 'O 53 in its present form was introduced to cure the mischief of its predecessor which was much narrower and more restrictive.'

[44] The authorities cited by the learned counsel for the plaintiffs to support the proposition that a challenge to a public law issue may be raised as a collateral issue in a claim for infringement of a right under public law have no application in this instant case. *R v Jenner* [1983] 2 All ER 46 is a criminal proceedings where the guilt of the accused is the main issue. In *Wandsworth London BC v Winder* [1984] 3 All ER 976 is a case of recovery of possession and rental. Itis in my view purely contractual and a private law issue between the tenant and the Borough Council. In *Davey v Spelthorne BC* [1984] AC 262 the action was for actionable tort for damages for negligent advice. This is again a private law issue between the advisee and the advisor. Similarly in *An Board Baine Co-operative Ltd (Irish Dairy Board) v Milk Marketing Board* case is a case of claim for damages arising from the decision of a public body to implement a price-fixing policy in respect of dairy products. Again here the claim is actionable in private law. It is to be observed that in all the cases cited by the learned counsel for the plaintiffs and alluded to above issue relating to public law issue was raised as a defence or collateral issue. The public law issue is not directly challenged nor formed the basis for the claim. The cases also are examples of the exception mentioned in *O'Reilly v Mackman* that allows public law issue to be raised as a collateral issue in a claim for infringement of a private law right. The question is does the plaintiffs' case come within this exception? I do not think so. It is obvious from the pleadings of the plaintiffs' case that the plaintiffs grounded their claim on the allegations that the Minister had acted unconstitutionally and had breached the rules of natural justice in issuing the Ministerial Direction that formed the plaintiffs' basis of complaint. This is clearly a direct challenge to the Minister's authority to issue such direction under the relevant law. That challenge means a challenge to the validity of the Ministerial Direction itself. It is not therefore merely a collateral issue as submitted by learned counsel for the plaintiffs.

[45] For the above reasons, I accept the submissions by the learned State Legal Officer that the plaintiffs' action by writ action is an abuse of court process. Accordingly I allow the defendants' application to strike out the plaintiffs' claim with costs. Costs to be taxed unless agreed.

Plaintiff's claim struck off with costs.

Reported by Loo Lai Mee